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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AT & T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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November 27, 1996

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QUESTIONS PRESENTED

1. Did the court below err in conferring prudential standing under its "suitable challenger" test on banks to challenge the National Credit Union Administration's interpretation of the Federal Credit Union Act, after acknowledging that the interests Congress intended to protect in the Act were antithetical to the interests of banks and contrary to the Fourth Circuit's holding that banks did not have such standing because they were not within the "zone of interests" Congress intended to protect?

2. Did the court below err in invalidating the National Credit Union Administration's 1982 interpretation of the Federal Credit Union Act's "common bond" provision, which permits federal credit unions to consist of multiple unrelated employer groups?

LIST OF PARTIES

The parties below included the following:

The National Credit Union Administration ("NCUA"), defendant in the district court and appellee below, is the agency charged with administration and enforcement of the Federal Credit Union Act.

Lexington State Bank, Piedmont State Bank, Randolph Bank and Trust Company and *Bankers Trust of North Carolina* joined the *First National Bank and Trust Company* in bringing this action against NCUA, as did the *American Bankers Association*. These parties were plaintiffs in the district court and appellants below.

AT&T Family Federal Credit Union ("ATTF") is a corporation organized and existing under federal law pursuant to the Federal Credit Union Act. Its purpose is to promote thrift among its members and to create a source of credit for productive purposes. *Credit Union National Association, Inc.* ("CUNA") is a trade association consisting of fifty-one credit union leagues. Its purposes include the representation of the interests of credit unions with respect to legislative and regulatory matters. ATTF and CUNA (collectively, "CUNA") were permitted to intervene as defendants in the district court and were appellees below. They submitted briefs on both the standing issue and on the merits in the district court and the court of appeals. Neither ATTF nor CUNA have any parent companies or subsidiaries.

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AT&T Federal Credit Union and Credit Union National Association, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on standing is reported at 988 F.2d 1272 and is reprinted in the appendix hereto ("App.") at 25a. That court's opinion on the merits is reported at 90 F.3d 525 and is reprinted at App. 1a. The district court's opinions on standing and the merits are reported at 772 F. Supp. 609 and 863 F. Supp. 9, respectively, and reprinted at App. 40a and 13a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 30, 1996. Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied on October 23, 1993. App. 50a and 52a. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The pertinent provisions of the Administrative Procedure Act, the Federal Credit Union Act, and the agency ruling at issue appear at App. 54a- 59a.

STATEMENT OF THE CASE

In this case, the plaintiff banks (the "Banks") challenged, under the Administrative Procedure Act ("APA"), the approval by the National Credit Union Administration ("NCUA") of certain amendments to the

charter of AT&T Family Federal Credit Union ("ATTF"). Their challenge placed in issue a 1982 interpretive ruling and policy statement of NCUA defining the scope of the "common bond" provision of Section 109 of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759 which regulates the membership of federal credit unions. As the court below expressly held, Congress' purpose in enacting the FCUA including the common bond provision was to promote the growth and viability of credit unions. NCUA effectuated that intent by setting forth a reasonable interpretation of the common bond provision which allows credit unions to consist of multiple unrelated employer groups, each with its own common bond.

The court of appeals, however, overturned the agency's interpretation through two decisions, each of which warrants this Court's review. First, notwithstanding the court's own recognition that the competitive interests of banks in weakening credit unions are antithetical to the interests that Congress intended to protect through the common bond provision, the court conferred standing on the Banks to enforce their preferred interpretation of that statute. The court, in a ruling that directly conflicts with the Fourth Circuit's resolution of the same issue, upheld the Banks' standing based on the D.C. Circuit's own untested "suitable challenger" doctrine -- an alternative route to standing created by that court for parties whose interests Congress did not intend to benefit. Second, relying on a 1927 dictionary definition that had not been urged on it by any party, and ignoring controlling precedent from this Court on the use of such sources, the court of appeals substituted its own interpretation of ambiguous statutory language for that of the agency entrusted to make such interpretations.

The court of appeals' ruling, if not reviewed by this Court, will have precisely the opposite effect from

that intended by Congress when it enacted the FCUA. The court's abrogation of NCUA's longstanding multiple group policy threatens to devastate the entire credit union industry by denying credit unions the opportunity to add new members and achieve member diversification necessary for their continued viability, and, if accorded the draconian effects urged by the Banks below, by dismembering thousands of credit unions throughout the Nation. The net result will be to make credit union services unavailable to millions of workers who now have access to them, thereby thwarting Congress' acknowledged goals in enacting the FCUA. Given the vital importance of this case for the entire credit union movement, the clear conflict in the circuits, and the conflicts between the court of appeals' decisions and this Court's precedents, certiorari is clearly warranted.

1. Federal Credit Unions And The Common Bond Provision

A credit union is a cooperative organization formed for the purpose of "promoting thrift among its members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1). Credit unions are distinctive in that the members of the credit union own and control the organization. 12 U.S.C. § 1757(6). Members purchase shares in the organization with their deposits and vote on such matters as election of directors, with each member receiving one vote regardless of number of shares. 12 U.S.C. §§ 1757(6), 1760. A credit union can also make loans and extend credit to its members and to other credit unions, but not to the general public. 12 U.S.C. § 1757(5). Deposits in federal credit unions are insured by the National Credit Union Share Insurance Fund.

Congress passed the FCUA in 1934, in the midst of the Great Depression, at a time when most individuals could not obtain loans at non-usurious interest rates and

had no organized method for saving. *See* S. Rep. No. 555, 72d Cong., 2d Sess. 2 (1934). Many states already permitted the chartering of credit unions under state law, but Congress believed this was inadequate. The Act was intended "[t]o establish a Federal Credit Union System * * * and to make more available to people of small means credit for provident purposes through a national system of cooperative credit * * *." Preamble to the Federal Credit Union Act, Pub. L. 73-467, 48 Stat. 1216 (1934).

The "common bond" provision of the FCUA is the focus of this action. It provides in relevant part that: "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district. 12 U.S.C. § 1759.

Congress included the common bond provision in the FCUA to encourage the effective and successful operation of credit unions. The court of appeals correctly concluded that Congress saw the common bond provision as "the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." App. 31a.[1/]

1/ In addition, Congress "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default." App. 31a. This also would contribute to the successful operation of the credit union.

This action involves the common bond of "occupation" described in Section 109. NCUA and its predecessors, as a matter of policy, have equated "occupation" with employment. Thus, most "occupational" credit unions were organized from among the employees of a particular company or other employer.

In 1982, NCUA adopted an interpretive ruling and policy statement (IRPS 82-1) permitting the granting of charters and charter amendments to credit unions that desired to serve multiple unrelated employer groups, where each group had its own common bond. 47 Fed. Reg. 16775 (1982), App. 57a. The court of appeals correctly concluded that this policy "was intended to enable each FCU [federal credit union] to realize economies of scale and to facilitate occupational diversification * * * and [make] it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU." App. 4a.

Over the past 14 years, NCUA's multiple group policy has been the primary engine for the growth in membership of federal credit unions. While relatively few new occupational credit unions have been formed since 1982 because of minimum size requirements and heavy start-up costs, about 3,500 federal credit unions have secured multiple group charters. These credit unions have absorbed about 156,000 employer groups and serve about 32 million individuals.

2. Proceedings Below

In 1990, eight years after NCUA had issued IRPS 82-1, five banks and the American Bankers Association (collectively, the "Banks") brought this action against NCUA challenging NCUA's approval of certain amendments to the charter of the ATTF. The Banks

claimed that these charter amendments violated the "common bond" requirement because there was not a single common bond uniting the members of all the groups.

ATTF and Credit Union National Association ("CUNA"), a trade association consisting of fifty-one credit union leagues, were permitted to intervene in the case as defendants on April 25, 1991.

On August 9, 1991, the district court dismissed the Banks' action on the ground that the Banks lacked prudential standing to challenge the NCUA actions at issue. App. 40a. The court utilized a two-part test for determining whether the banks were within the "zone of interest" of the common bond provision of the Federal Credit Union Act. First, the court determined that banks were not "intended beneficiaries" of the common bond provision. App. 47a. Second, the district court applied the D.C. Circuit's "suitable challenger" test which permits plaintiffs who are not intended beneficiaries of the statute in question nonetheless to sue if their interests merely "coincide" systematically with the interests which Congress *did* intend to protect. Using the test, the district court found that banks were not suitable challengers to agency decisions about the common bond provision, because "[T]he interests of banks will rarely, if ever, coincide with those of credit unions, the interest which Congress did intend to protect * * *." App. 47a.

The court of appeals reversed. App. 25a. The court of appeals agreed with the district court that "Congress did not, in 1934, intend to shield banks from competition from credit unions." App. 30a. To the contrary, the court found this notion "anomalous" because Congress' "general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." App. 30a.

The court of appeals then went on to consider what it described as the "more subtle" question whether banks could be considered "suitable challengers" to enforce the common bond provision. App. 31a. It concluded that the interests of banks were sufficiently congruent with the interests protected by the common bond provision for the court to allow the suit. The D.C. Circuit stated that it "cannot agree" with *Branch Bank & Trust Co. v. National Credit Union Admin.*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), an identical case in which the Fourth Circuit ruled that banks lacked standing to challenge NCUA's interpretation of the common bond provision.

Following remand, the district court resolved the merits in favor of NCUA and the Intervenor Defendants. It held that the part of Section 109 that governed occupational credit unions was ambiguous and that NCUA's interpretation of it permitting credit unions to include multiple employer groups, each with its own common bond, was entitled to deference under the first step of the analysis set forth by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The plaintiffs had not even argued that they could prevail under the second step of the *Chevron* analysis if the statutory provision were found to be ambiguous, so the court granted summary judgment in favor of the defendants. App. 23a-24a.

The court of appeals again reversed. App. 1a. The court held that the language of the common bond provision unambiguously precluded NCUA's interpretation of it. The court also concluded that NCUA's interpretation frustrated the purpose of the provision because it diminished the cohesiveness among credit union members. The court of appeals subsequently denied defendants' petition for rehearing and suggestion for rehearing *en banc*. App. 50a and 52a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION ON STANDING CONFLICTS WITH THIS COURT'S PRECEDENTS AND HAS CREATED A CONFLICT IN THE CIRCUITS

In ruling that banks have standing to challenge the alleged failure of NCUA to abide by the "common bond" requirement, the court of appeals recognized that the interests of banks were *not* among those that the statute was intended to protect. Indeed, the court recognized that the statute, far from protecting banks from competition, had the directly contrary objective of fostering the continued growth and viability of credit unions. Nevertheless, the court granted the Banks standing based on its "suitable challenger" doctrine, an alternative route to standing of that court's own making. In so doing, however, the court disregarded this Court's precedents establishing that Congressional intent is the touchstone of the "zone of interests" standing inquiry, and created a conflict in the circuits on the precise issue presented in this case. Given the importance of the issue and the irreconcilable conflict among the circuits, this Court should grant review to decide whether the court of appeals properly extended this Court's standing jurisprudence to allow challenges by parties whose interests Congress did not intend to protect but who are, in the view of a particular judge, nevertheless "suitable challengers" of agency action.[2/]

2/ When we initially petitioned this Court for review of this question, the Solicitor General, while agreeing that the issue warranted this Court's review, contended that the petition was unripe because the lower courts had not yet ruled on the merits of

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A. The Court Should Decide The Validity Of The D.C. Circuit's "Suitable Challenger" Doctrine

There is no question that the court of appeals' ruling represents a marked departure from this Court's prudential standing jurisprudence. The court of appeals, rejecting the Banks' contrary argument, expressly recognized that banks "were not intended beneficiaries of the FCUA * * *." App. 25a. That is because "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." App. 30a. *See also* 31a ("we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks"). The court reiterated that holding in its subsequent opinion on the merits. App. 1a.[3/] In short, the court

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the Banks' contentions. The Solicitor General, however, noted that once the merits had been decided, "this Court would have the opportunity to review the standing question, as well as the question of the validity of the NCUA's interpretation of the Act, in a single proceeding." Brief for the Federal Respondent in Opposition, *AT&T Family Credit Union v. First National Bank & Trust Co.*, No. 92-2010. Thus, the standing issue is now plainly ripe for this Court's review.

3/ The legislative history of the FCUA, and of the District of Columbia law upon which it was modeled, clearly evidence that intent. *See, e.g.*, S. Rep. No. 555, 73d Cong., 2d Sess. 3 (Congress established federal credit union system to "bring normal-credit resources on a cooperative basis to the masses of the

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recognized that Congress' goal in enacting the FCUA and the common bond requirement -- ensuring the continued viability of credit unions so that they could serve customers disdained by banks -- is completely antithetical to the interests of the Banks in limiting competition from credit unions. That holding should have been sufficient (as the district court held, App. 40a) to conclude that the Banks' interests were not even arguably within the "zone of interests" protected by the statute, and therefore that they lacked standing to challenge NCUA's purported misapplication of it.

Nevertheless, the court of appeals held that the Banks had standing under that court's own "suitable challenger" doctrine. That doctrine, which finds its genesis in the D.C. Circuit's decisions in *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988) ("*HWTC II*"), *cert. denied*, 490 U.S. 1106 (1989), and *Hazardous Waste Treatment Council v. EPA*, 885 F.2d 918 (D.C. Cir. 1989) ("*HWTC IV*"), sets forth an alternative standing test for parties whose interests are not among those that Congress intended to benefit when

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people whose buying power is now so often dissipated in high rate interest charges"); *id.* at 3 (FCUA intended to foster "more rapid national development" of credit unions); 78 Cong. Rec. 7259, 12,224 (1934) (Congress believed that national credit union system would benefit "the masses of the people" by providing alternative to both banks and loan sharks); *Incorporation of Credit Unions: Hearings Before the Committee on the District of Columbia on S. 1153*, 72d Cong., 1st Sess. 14 (1932) (credit unions seen as alternatives to loan sharks); *id.* at 28 (credit unions would "bring out savings and concentrate savings in credit unions that would not, otherwise, find the banks * * *.") (statement of Sen. Gore).

it enacted the statute in question. Under this "more subtle" test (App. 31a), such parties may be accorded standing if their interests, "while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *HWTC IV*, 885 F.2d at 922. *See also HWTC II*, 861 F.2d at 283 ("In the absence of apparent congressional intent to benefit * * * there may still be standing if some factor -- some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect -- supports an inference that Congress would have intended eligibility."). The only apparent limitation on this new doctrine is that the interests of a "suitable challenger" must coincide "systematically, not fortuitously * * * with the interests of those whom Congress intended to protect." *HWTC IV*, 885 F.2d at 924.[4/]

As this case demonstrates, that limitation has little practical content. Conceding that the issue was "devilishly complex," App. 37a, the court of appeals applied its alternative "suitable challenger" test to uphold standing. The court held that even though the goals of the common bond provision were completely at odds with the competitive interests of Banks, "[t]here is * * * a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end." App. 36a. As the court further explained, "when the plaintiff seeks to enforce a statutory restriction on his

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4/ *See also HWTC II*, 861 F.2d at 283, 284 (standing will not exist where interests "coincide only accidentally" or bear only an "oblique relation to the statutory goal").

competition -- a restriction the plaintiff enjoys as well as the statutory beneficiaries -- there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of a statutory scheme." App. 37a.

The D.C. Circuit's "suitable challenger" doctrine, while now firmly embedded in that court's jurisprudence, finds no support in this Court's precedents. In *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), this Court explained that standing will be permitted only where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Id.* at 153. Thus, in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), the Court explained that "[a]t bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Id.* at 400. And more recently, in *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991), this Court reiterated this longstanding test in denying standing to postal workers challenging an administrative decision under the Private Express Statute ("PES"). As the Court explained, to determine standing "[w]e must inquire, then, as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." *Id.* at 524. The Court denied standing because the specific statute in question evidenced no intent to benefit the interests of postal workers.5/

5/ *See also INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor*, 114 S. Ct. 422, 424 (1993) (O'Connor, J., in chambers) (granting stay of district court

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As can be seen, this Court's precedents focus on whether the plaintiff's interests are within the zone of interests that Congress intended to protect. These precedents contain no alternative route to standing that examines whether a plaintiff's interests, although concededly not among those that Congress intended to protect, are nevertheless aligned in some way with the interests of the statute's actual beneficiaries so as to make that plaintiff, in the court's view if not that of Congress, a "suitable challenger." Indeed, Judge Wald dissented from the D.C. Circuit's original formulation of the doctrine and only reluctantly concurred in the judgment below, noting that the doctrine "is without roots either in Supreme Court law or in the general purposes of standing." App. 38a (Wald, J., concurring). *See also HWTC IV*, 885 F.2d at 930 (court's "rewriting of 'zone of interests' law is * * * fundamentally at odds with Supreme Court and current precedent") (Wald, C.J., dissenting). As Judge Wald explained, the "suitable challenger" doctrine requires "profound judgments about the overall suitability of diverse organizations or sprawling multinational corporations to challenge regulatory schemes, insisting we weigh the various ways in which the entity's interests are internally inconsistent or conflict with other groups who would be within the zone of interests. This is not an appropriate

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decision allowing standing where there was "no indication that [the statute] was in any way addressed to [the plaintiffs'] interest"); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) (inquiry is whether congress "intended for [a] class [of plaintiffs] to be relied upon to challenge agency disregard of the law").

task for the courts." *HWTC IV*, 885 F.2d at 933 (Wald, C.J., dissenting).[6/]

The court of appeals purported to find authority for its "suitable challenger" doctrine in a single footnote in this Court's opinion in *Clarke*. App. 30a; *HWTC IV*, 885 F.2d at 922. In that footnote, the Court explained that the zone of interests inquiry "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 497 U.S. at 397 n.12. It is plain, however, that this footnote was merely describing the effect of this Court's zone of interests analysis, which "[a]t bottom * * * turns on congressional intent," *id.* at 400, and was not thereby creating a new, alternative route to standing for those whose interests are not among those Congress intended to protect. As Judge Wald noted below, this Court decided *Clarke* under its longstanding zone of interests jurisprudence, "not under any 'suitable challenger' test akin to that laid down in *HWTC IV*." App. 38a n.1 (Wald, J., dissenting). In this regard, it is notable that the Court, in its subsequent *Air Courier* decision, denied standing to the postal workers under its traditional inquiry into congressional intent -- without analyzing whether the workers, although their interests were not among those Congress intended to

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6/ In *HWTC IV*, Judge Wald believed that the suitable challenger doctrine was an unwarranted extension of this Court's precedents, but also believed that the plaintiff should have been accorded standing under this Court's zone of interests jurisprudence because Congress had intended to benefit its interests. As the present case makes clear, the D.C. Circuit's "suitable challenger" doctrine is in fact an alternative route to standing for parties who would otherwise not be accorded standing because their interests are not those which Congress intended to benefit.

protect, nevertheless possessed some characteristic that made them "suitable challengers."

Contrary to the reasoning of the court below (App. 29a-37a), its suitable challenger doctrine does not find general support in this Court's decisions upholding the standing of competitors in *Clarke*, *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("*ICI*"), and *Data Processing*. Each of these cases arose under "entry restricting" statutes that were intended by Congress to limit the competitive reach of regulated firms. Thus, in *Clarke*, the Court held that the statute in question, the National Bank Act, was intended by Congress "to keep national banks from gaining a monopoly control over credit and money through unlimited branching," 479 U.S. at 403, and therefore held that the banks' competitors were within the zone of interests protected by that statute. Likewise, in *ICI* and *Data Processing*, the Court upheld competitors' standing to challenge decisions under the Glass-Steagall Act, because in that statute "Congress had arguably legislated against the competition that [the plaintiffs sought] to challenge." *ICI*, 401 U.S. at 620. These decisions are thus plainly applications of the zone of interests test, not alternatives to it.

The APA contains "generous review provisions" and the zone of interests test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 395, 399. There is no need, therefore, to devise a new alternative to that test, a "more subtle" approach that the court below acknowledged was "devilishly complex" in application. App. 31a, 37a. Having recognized that the Banks' interests were not in any way among those that Congress intended to benefit, the court below should have dismissed this suit for lack of standing.

Instead, the decision below turns this Court's standing inquiry on its head. Whereas this Court has

inquired whether the plaintiff's interests are among those that Congress intended to benefit or protect, in this case the court of appeals conferred standing on entities with interests that the court itself held are completely *antithetical* to the interests Congress intended to protect. As the court of appeals recognized, "[t]he common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." App. 31a. Yet that same court allowed the Banks -- whose competitive interests are completely at odds with this statutory purpose of promoting "credit unions' continued success" -- to bring a challenge designed to cripple credit unions throughout the Nation. This Court explained in *Clarke* that the zone of interests test was intended to avoid just such a result -- "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." 479 U.S. at 397 n.12. The Court should not allow this potentially devastating result to occur without reviewing the unprecedented standing doctrine giving rise to it.7/

7/ The Banks seek an order compelling the NCUA "to cause all federal credit unions, notwithstanding any contrary past NCUA authorization, to reduce their existing membership" in light of the decision below -- *i.e.*, to expel members added over time pursuant to the multiple group policy. Amended Complaint for Declaratory and Injunctive Relief at 9 (filed Nov. 15 1996). Such an order -- which would be devastating to the ongoing viability of large numbers of credit unions -- is hardly consistent with the acknowledged legislative purpose of promoting the growth and strength of credit unions. The fact that the Banks would demand such relief confirms in the starkest possible terms that they seek "to frustrate [rather] than to further [the] statutory objectives," and that they are precisely the sort of plaintiffs the zone of interests test was designed "to exclude." *Clarke*, 479 U.S. at 397 n.12.

B. The Court Should Resolve The Conflict In The Circuits Over This Important Question

The court of appeals' decision on standing squarely conflicts with the decision of the Fourth Circuit in a case raising the identical issue. In *Branch Bank and Trust Co. v. National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), that court held that banks lacked standing to challenge the NCUA's alleged misinterpretation of the common bond requirement.

Like the court of appeals in this case, the Fourth Circuit recognized that the interests of banks were not among those that Congress intended to protect through the FCUA. Quite to the contrary,

> The federal credit union system was * * * established as an alternative to an unacceptable credit structure, a structure that included banks. Thus, the general purposes of the Act, rather than indicating a desire to protect banks, instead suggests that the competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited means. Absent any specific evidence to the contrary, it would be anomalous to conclude that the banks were somehow protected by this action.

Id. at 626.

And "[c]onsistent with the general goals of the statute, the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks." *Id.*

But unlike the court below, the Fourth Circuit (per Judge Wilkinson) held that this evidence of congressional intent showed that banks were not in the zone of interests protected by the Act and therefore lacked standing to enforce their view of the common bond requirement:

> There is no evidence from any source cited to the court that Congress also intended by this provision to protect the competitive interests of banks. Given the specific rationale for the common bond requirement, we will not attribute to it a meaning that is at cross purposes with the general goals of the statute. If the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position. *Id.*

The Fourth Circuit stressed the importance of adhering to the zone of interests limitation on standing, noting that the test "serves primarily to advance * * * separation of powers values." *Id.* at 624. As the court explained, basing standing on injury alone "would necessarily obstruct and undermine legislative control and guidance * * * by conferring standing on a host of parties whose interests Congress failed to protect." *Id.* The court noted that, in the legislative process, Congress necessarily decides to advance some interests and not others:

> Proper respect for the judgment of Congress * * * requires that some degree of finality be accorded its balancing of interests. * * * [T]he zone test dictates that parties left unprotected * * * by legislation must return to the legislative process if they

> are dissatisfied with its outcome. Absent some evidence that the interests of these parties are a subject of continuing concern in the statutory scheme, we will not allow them to reopen the legislative inquiry in a federal court.

Id. at 625.

That is, however, precisely the result of the new standing test applied by the D.C. Circuit in this case: the Banks -- whose interests Congress had no intention of protecting when it enacted the FCUA -- have nevertheless secured substantial protection from competition under the FCUA from the courts.

Neither the court below nor the Banks have disputed that the D.C. Circuit and the Fourth Circuit have reached diametrically opposed conclusions on the same issue. Rather, the Banks have argued that the Fourth Circuit's decision in *Branch Bank* was superseded by this Court's later decision in *Clarke*. The court below adopted this position, holding that "[t]he subsequent explication of the suitable challenger route to standing in *Clarke* empties the *Branch Bank* decision of its persuasiveness." App. 33a n.3.

As explained above, however, this proposition finds no support in this Court's decision in *Clarke*. That opinion did not "explicat[e] * * * the suitable challenger route to standing." Rather, that new route was blazed by the D.C. Circuit itself. As noted, far from formulating an alternative standing doctrine for parties whose interests are antithetical to those Congress intended to protect, the Court in *Clarke* (and subsequently in *Air Courier*) reiterated that congressional intent to benefit is the touchstone of the zone of interests inquiry. *See supra*

at 12, 14. The Fourth Circuit has indicated no intent to reconsider its holding in *Branch Bank*, which remains the law of that Circuit. Simply put, one of these courts -- either the D.C. Circuit or the Fourth Circuit -- is in conflict with this Court's precedents. We believe that court is the D.C. Circuit, but that is a question that only this Court can resolve.

Moreover, the D.C. Circuit's "suitable challenger" doctrine, if not reviewed by this Court, will continue to have far-reaching effects. Indeed, since the decision on standing in this case, one other circuit has weighed in on the issue. In *Community First Bank v. National Credit Union Administration*, 41 F.3d 1050 (6th Cir. 1994), the Sixth Circuit recognized that "[t]he two courts that have addressed whether banks have standing to challenge charter provisions of credit unions under the [FCUA] have reached contrary results." *Id.* at 1054. The Sixth Circuit "enter[ed] the debate" and followed the D.C. Circuit in upholding the standing of banks as "suitable challengers" to the NCUA's purported misinterpretation of the common bond requirement. *Id.*

The Sixth Circuit, however, appeared to rest entirely on its belief that "[r]efusing to allow competitor banks to challenge credit union expansion might preclude any challenge to an excessively risky credit union expansion," because, in its view, credit union members, other credit unions, and consumer protection groups lacked sufficient incentives to mount such challenges. *Id.* Not only is this assertion wrong as a factual matter, *see Casazza v. Department of Commerce*, 350 N.W.2d 855 (Mich. App. 1984) (credit union members brought suit to challenge alleged misapplication of state law common bond requirement), but it squarely conflicts with this Court's unambiguous holdings, *see, e.g.*,

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227 (1974) ("[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing"). The Sixth Circuit's reasoning is arguably even more expansive than the D.C. Circuit's "suitable challenger" test, for it would allow standing to any party regardless of its connection (or lack of connection) to the interests Congress intended to protect, whenever a particular court believes that the intended beneficiaries would be unlikely to sue. Thus, the Sixth Circuit's decision, far from lending credence to the D.C. Circuit's ruling, has only engendered additional confusion regarding the issue.[8/]

II. THE COURT OF APPEALS ERRED IN ITS APPROACH UNDER THE *CHEVRON* DECISION

The court of appeals' decision invalidating NCUA's longstanding interpretation of the common bond provision likewise warrants this Court's review. The court relied largely on an analysis of the provision that was never advanced by the plaintiffs. To reach its conclusion that the provision was unambiguous, the court assigned a meaning to a word it regarded as critical to its interpretation. However, the very dictionary the court cited for the plain meaning of that word contained an

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8/ The Sixth Circuit is now considering the merits of the plaintiffs' argument that NCUA's multiple group policy contravenes Section 109 of the FCUA. *First City Bank v. National Credit Union Administration*, No. 95-6543.

alternative definition that undercuts the court's analysis. The court of appeals' conclusion that the provision can have only one meaning in this circumstance directly conflicts with this Court's teaching in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), which holds that a statute cannot be found unambiguous in light of such evidence.

The court of appeals also incorrectly concluded that its reading of Section 109 furthered Congressional intent. To the contrary, its construction is inconsistent with Congress' overriding and expressly-stated objective of making credit union services available to as many people as possible. NCUA's interpretation, on the other hand, furthers that objective while still preserving values Congress believed were protected by the common bond provision.

Because Section 109 does not speak unambiguously to the issue presented here, the court below should have deferred NCUA's reasonable interpretation of this provision. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

A. The "Occupational" Common Bond Provision Of Section 109 Is Ambiguous

Section 109 states in relevant part: "that Federal credit union membership shall be limited to groups having a common bond of occupation * * * or to groups within a well-defined neighborhood, community or rural district."

The plaintiffs argued to the court of appeals that the singular article "a" in the phrase "groups having a

common bond" means that Congress intended that all members of a credit union must share a single common bond. The NCUA and the Credit Union Intervenors argued in response that the plural "groups" in the same phrase contemplates that a credit union may consist of multiple groups provided each had its own common bond. The court of appeals rejected both arguments, which should have led to the conclusion that Section 109 is ambiguous. However, the court of appeals instead adopted an entirely different reading of Section 109 -- one that it regarded as plain even though it had not been suggested or briefed by either party.

The court stated that the common bond concept is already implicit in the ordinary meaning of the word "group." Therefore, the court reasoned, to give meaning to the phrase "having a common bond," it is necessary to require all the members of multiple groups to share the same common bond. Otherwise, the phrase would be surplusage. App. 6a-7a.

The only support the court provided for the assertion that "group" ordinarily implies commonality is the 1927 version of *Webster's New International Dictionary* that was current when the FCUA was passed in 1934. The court quoted from subpart 4 of the definition which referred to an "assemblage . . . having some resemblance or common characteristic." App. 6a. However, the degree of commonality reflected in that definition is minimal. The court correctly recognized elsewhere in its opinion that the common bond provision was designed to be the "cement that united credit union members in a cooperative venture." App. 3a. This sort of cohesiveness or "cement" is not implied in the court's chosen definition of the word "group."

As importantly, the court chose to ignore another meaning of "group" in the same dictionary that does not imply any commonality at all. Subpart 3 of the definition defines group merely as "An assemblage of persons or things regarded as a unit because of their comparative segregation from others; a cluster; aggregation; as, a *group* of trees or of islands." Subpart 3 is different from the subpart 4 definition in that it lacks the very element of commonality that the court believed was implicit in the word "group." The subpart 3 meaning does not imply any "resemblance or common characteristic" and certainly does not suggest the existence of any "cement" that would unite members in a "cooperative venture."

If Congress used "groups" consistent with the subpart 3 meaning, the phrase "having a common bond" is not surplusage at all. Indeed, the phrase is required to impart the concept of commonality that is otherwise lacking in the subpart 3 meaning of "group." If it is not surplusage, there is no basis for the court of appeals' conclusion that "having a common bond" requires that members of all groups share the same common bond.

In any event, the dual meaning of "group" precludes a *Chevron* step 1 conclusion that the statute can have only one meaning. If the plain language of the statute does not exclusively support the Banks' position, *Chevron* requires deference to NCUA's interpretation. This Court's decision in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), is directly on point. There, the dispute turned on the meaning of the word "required" in the phrase "required for intercity rail passenger service." The ICC interpreted "required" broadly, to encompass the meaning "useful and appropriate." The court of appeals rejected the

ICC's interpretation saying that "required" meant indispensable or necessary. 503 U.S. at 416.

This Court reversed. It noted that Webster's Dictionary contained alternative definitions of the word "required," each making some sense under the statute. One of the definitions supported the agency's interpretation. The Court said that this fact itself indicated that the statute is "open to interpretation," mandating deference to the agency's interpretation under *Chevron*. 503 U.S. at 417.

The court of appeals' ruling plainly conflicts with this Court's express holding in *Boston & Maine*. As in that case, the dictionary definition relied on by the court of appeals contains alternative definitions, at least one of which supports the agency's interpretation. Accordingly, as in that case, the statute is "open to interpretation" and deference is warranted under *Chevron*. The court of appeals' marked departure from this Court's holding is plainly grounds for this Court's review.2/

2/ The court of appeals' decision cannot be sustained on the ground, relied on by the court as additional support for its holding, that another part of Section 109 limits membership in community-based credit unions to people in a single community. *See* App. 8a-9a. That provision, unlike the common bond provision, contains language requiring that members of a community-based credit union reside "within" the same community. The common bond provision contains no similar language requiring that members of an occupation-based credit union share the same common bond "within" the same company.

B. NCUA's Interpretation Is Consistent With Both The Overriding Purpose Of The Act And The Purpose Of The Common Bond Provision

The court of appeals erroneously concluded that NCUA's interpretation frustrates Congressional policy because it eliminates the cohesiveness of the credit union's members. App. 10a. However, the role of the common bond provision and NCUA's interpretation of it must be evaluated within the context of the broader objectives of the Act. When this is done, it is clear that NCUA's interpretation advances Congress' objectives.

The primary objective of the FCUA was to make credit union services available to more people. The Preamble to the FCUA itself provides that the purpose of the Act was "[t]o establish a Federal Credit Union System * * * and to make more available to people of small means credit for provident purposes * * *." Pub. L. 73-467, 48 Stat. 1216 (1934). NCUA's multiple group policy helps achieve this objective. As the court of appeals recognized, many employee groups are too small to meet NCUA's minimum number of potential members -- 500 -- for the establishment of a credit union. App. 4a. That is why most of the growth in federal credit union membership occurs as a result of NCUA's multiple group policy, which permits relatively small employee groups to band together to support a credit union.

The primary objective of the common bond provision of the FCUA was not to limit growth *per se* but to enhance the financial stability of credit unions. *See* pp. 4-5 *supra*. NCUA's multiple group policy furthers this goal by allowing credit unions to achieve member diversification and economies of scale. App. 4a.

These are measures that NCUA believes would assure the long-term viability of credit unions. *Id.*

There is no doubt that, as the court of appeals concluded, Congress also intended the common bond provision to help assure the success of federal credit unions by serving as "the cement that united credit union members in a cooperative venture." App. 3a. NCUA's interpretation preserves this value. Such a bond exists among the members of each employee group in the credit union. This bond assures that many of the credit union's members are known to each other and creates a sense of shared responsibility for the success of the credit union that discourages defaults. There is no reason for the Court to assume, contrary to the agency's considered judgment, that the overall amount of "cement" in a credit union consisting of a number of smaller groups is significantly less than the amount in one very large employer group with the same aggregate number of workers.

III. IMPORTANT QUESTIONS ARE RAISED WITH RESPECT TO BOTH STANDING AND THE MERITS

This case is of critical importance to the entire credit union industry and to the millions of workers who rely upon credit union services. By conferring standing on banks whose competitive interests are antithetical to the interests of credit union members that Congress intended to protect, and by invalidating a longstanding policy designed to ensure the continued growth and viability of credit unions, the court of appeals' ruling substantially and adversely impacts the entire federal credit union system.

The policy invalidated by the court of appeals has been the primary means for the growth in federal credit union membership since it was adopted in 1982. It has permitted approximately 3,500 credit unions, serving more than 32,000,000 members in about 156,000 employer groups, to diversify their membership base in a manner that protects the safety and soundness of the credit union system and the resources of the National Credit Union Share Insurance Fund. Without this policy, many credit unions may lack sufficient membership to remain financially viable. And without this policy, many thousands of current and prospective credit union members, who work for companies that are too small to sustain a credit union by themselves, will be deprived of needed access to credit union services. That result would thwart Congress' precise goals in enacting the FCUA, and should not be permitted to occur without this Court's review.

The relief sought by the Banks in response to the court of appeals' decision only serves to underscore the potentially devastating impact of that decision for credit unions throughout the Nation. Following remand to the district court, the American Bankers Association and two other banking associations commenced a new action seeking nationwide declaratory and injunctive relief enforcing the court of appeal's decision. They sought an order granting prospective relief that 1) bars NCUA from authorizing any federal credit union to add additional employer groups whose members do not share a single common bond with the credit union "core" group and 2) prevents credit unions from adding new members to all of the about 156,000 groups approved by NCUA since 1982 pursuant to its multiple group policy unless those new members share a common bond with the members of the core group. This relief, as a practical matter,

precludes credit unions from enrolling new members in these groups as existing members die or move away. The complaint also seeks the ultimate divestiture of those groups. This relief would destroy enormous investments made by credit unions to serve employer groups and undermine the viability of the federal credit union system.[10/]

Moreover, the D.C. Circuit's "suitable challenger" doctrine -- if not reviewed by this Court -- will continue to have far-reaching effects on agencies throughout the federal government. As this Court has noted when explaining its reasons for granting certiorari to review a decision of the D.C. Circuit on an important question of administrative law, "[s]ince the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 n.14 (1978). That has already happened with respect to the issue presented in this case. Since the D.C. Circuit formulated its "suitable challenger" test in 1989, it has applied that doctrine in numerous cases involving challenges to a wide range of

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10/ On October 25, 1996, the district court issued a permanent nationwide injunction granting the prospective relief sought by the plaintiffs. The claim for divestiture is still pending before the court.

agency actions.[11/] Given that court's dominant role in this area of the law, and the recurring impact of its new approach to standing, this Court should review that untested doctrine to determine whether it comports with the "zone of interests" analysis established by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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11/ *See, e.g., Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900 (D.C. Cir. 1996); *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1360-61 (D.C. Cir. 1996); *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697, 705-06 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 724 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994); *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 907 (1992); *DKT Memorial Fund Ltd. v. Agency for International Development*, 887 F.2d 275, 286 (D.C. Cir. 1989).

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 29, 1995 Decided July 30, 1996

No. 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL.,
APPELLANTS

v.

NATIONAL CREDIT UNION ADMINISTRATION,
APPELLEE

AND

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 90cv02948)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Christopher R. Lipsett argued the cause for appellants, with whom *Michael S. Helfer, Leon B. Greenfield, John J. Gill, III,* and *Michael F. Crotty* were on the briefs.

Jacob M. Lewis, Attorney, U.S. Department of Justice, argued the cause for appellees, with whom *Frank W. Hunger,* Assistant Attorney General, *Eric H. Holder, Jr.,* United States Attorney, *Douglas N. Letter,* Litigation Counsel, U.S. Department of Justice, and *John K. Ianno,* Counsel, National Credit Union Administration, were on the brief for appellee National Credit Union Administration.

Paul J. Lambert and *Teresa Burke* were on the brief for appellees AT&T Family Federal Credit Union and Credit Union National Association.

Edward C. Winslow, III, and *William C. Scott* were on the brief for amicus curiae North Carolina Alliance of Community Financial Institutions.

Before: BUCKLEY, GINSBURG, and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Section 109 of the Federal Credit Union Act (FCUA), 12 U.S.C. § 1759, provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The question presented in this appeal is whether the members of an occupational FCU must all share a single "common bond of occupation" or, as the National Credit Union Administration (NCUA) contends, membership may be drawn from multiple unrelated groups, each with its own common bond. The district court held that the NCUA reasonably interpreted that Act to allow members of unrelated groups to join the same credit union, provided only that a common bond exists among the members of each constituent group. 863 F. Supp. 9 (1994). Because the Congress resolved this very issue the other way, we reverse the district court and disapprove the decision of the NCUA under step one of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984).

I. Background

The plaintiffs-appellants are the American Bankers Association and several North Carolina banks, including First National Bank and Trust Company (FNBT). They brought this suit against the NCUA, the federal regulatory agency that administers the FCUA, seeking to overturn that agency's approval of certain applications filed by AT&T Family Federal Credit Union (ATTF) to expand its field of membership to include employees of various small businesses in North Carolina and Virginia that are unaffiliated with the credit union's existing membership base. ATTF and the Credit Union National Association, a trade association, have intervened in support of the agency.

Under the FCUA, an FCU is, like a mutual association or a cooperative, owned and controlled by its members, *see* 12 U.S.C. § 1757(6); it can make loans to and take deposits from (formally, sell shares to) only its own members and other credit unions, *see id.* § 1757(5). The Congress expected that the Act, by "guaranteeing democratic self-government[,] would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs." *First Nat'l Bank and Trust Co. v. NCUA,* 988 F.2d 1272, 1274 (D.C. Cir. 1993).

The "common bond" provision has been part of the FCUA since the statute was enacted in 1934. The Congress did not fully explicate the purpose or limits of that provision, but "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.... The common bond was seen as the cement that united credit union members in a cooperative venture." *Id.* at 1276.

From 1934 until 1982 the NCUA interpreted the common bond requirement to mean that the members of each occupational FCU—we put aside the associational alternative, which plays no role in this case—must be drawn from a single occupational group, defined to mean the employees of a single employer. 58 Fed. Reg. 40473 (July 28, 1993). In 1982,

however, the NCUA altered its interpretation of nearly 50-years' standing to allow an FCU to comprise not just one but "multiple occupational groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). Each such group need only be within a "well-defined area," IRPS 82-3, 47 Fed. Reg. 26808 (June 22, 1982), by which the NCUA means an area served by an actual or planned office (of which there may be any number) of the credit union, IRPS 89-1, 54 Fed. Reg. 31165, 31170 (July 27, 1989).

The 1982 change of interpretation was intended to enable each FCU to realize economies of scale and to facilitate occupational diversification within the ranks of its membership. *See* Letter from E.F. Callahan, Chairman of the NCUA, to Congressman Fernand J. St. Germain, Chairman of the House Committee on Banking, Finance and Urban Affairs 8-9 (Oct. 28, 1983). The new policy also made it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU. 54 Fed. Reg. at 31171. The NCUA reiterated its new position through policy statements issued in 1989, when ATTF filed the first of the applications that FNBT here challenges, and most recently in 1994. *See id.* at 31165; IRPS 94-1, 59 Fed. Reg. 29066 (June 3, 1994). The agency explained in 1989 that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." 54 Fed. Reg. at 31176.

FNBT's complaint is at bottom that Interpretive Ruling 89-1 violates the FCUA by allowing groups lacking any common bond among them to join together in a credit union, ATTF in particular. Originally chartered in 1952 as the Radio Shops Federal Credit Union, the common bond of ATTF members was that they were "[e]mployees of the Radio Shops of Western Electric Company, Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate

families; and organizations of such persons." ATTF has since grown to have 112,000 members in more than 150 disparate occupational groups spread across all 50 states, including the employees of a major tobacco company, an auto supply chain, and a television station. Its potential membership exceeds 357,000. As of January 1994 ATTF had more than 63,000 loans outstanding, totaling over $268 million. FNBT maintains that by allowing ATTF to accept members from among the employees of any number of employers, the NCUA has in effect opened the membership to anyone with a job.

Initially, the district court dismissed this case for lack of standing, 772 F. Supp. 609, 612-13 (1991); on appeal, however, we reversed on the ground that the banks are "what we have termed suitable challengers, that is ... their interests are sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." 988 F.2d at 1275. We remanded for a determination on the merits, as to which the district court granted the defendant's motion for summary judgment. 863 F. Supp. 9. The district court held that the common bond requirement is ambiguous and that the NCUA's interpretation of the provision to mean that "a credit union may have several groups, each with its own common bond" is reasonable.

II. Analysis

We review an agency's interpretation of a statute entrusted to its administration under the familiar rubric of the *Chevron* case: If the Congress has "directly spoken to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress"; if, however, the statute is silent or ambiguous on the question at issue, then the court will defer to the agency's interpretation if it is permissible in light of the structure and purpose of the statute. 467 U.S. at 842-43. In resolving the threshold question whether congressional intent is sufficiently clear for us to review the case under step one of *Chevron*, "we are not required to grant any

particular deference to the agency's parsing of statutory language or its interpretation of legislative history." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984).

FNBT argues this case under step one of *Chevron* only. According to FNBT, the intent of the Congress is clearly discernible from the statutory text and the purpose of the statute. We agree.

A. Section 109 by Its Terms

To repeat, § 109 provides in relevant part that "Federal credit union membership shall be limited to groups having a common bond of occupation ... or to groups within a well-defined neighborhood, community, or rural district." FNBT contends, first, that the article "a" in the phrase "groups having a common bond" means that all members of an FCU must be united by a single occupation. The NCUA counters that the plural noun "groups" in the same phrase indicates that there may be multiple groups in an FCU, so that the statute makes sense only if it is understood to contemplate multiple bonds, each uniting a single group even if the same bond does not unite all groups, *i.e.*, the membership as a whole.

Neither syntactical argument is convincing. The article "a" could as easily mean one bond for each group as one bond for all groups in an FCU, and the plural noun "groups" could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union under the FCUA. Indeed, focusing upon "groups" begs the question whether they must share a common bond; it is, after all, a common bond that makes a group of what would otherwise be a collection of individuals without a theme.

Nonetheless, use of the word "groups" in § 109 does support FNBT's interpretation and not the NCUA's. As a leading dictionary of the time put it, a group is an "assemblage ... having some resemblance or common characteristic." *Webster's New International Dictionary* 955 (1927). By this definition, a common bond is implicit in the term

"group." Therefore, if two or more "occupational groups" can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups.

Or, viewing the question another way, the term "common bond" would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU. Instead of limiting membership to "groups having a common bond of occupation," the Congress could, without affecting the meaning of the statute, have simply said "occupational groups." The addition of the term "common bond" is necessary only to impart the idea that the bond is one shared by all members of the FCU—regardless whether the FCU is composed of one or of multiple groups. If the members of a group are by definition bonded, then it is tautological to say that a single group has a common bond; but if multiple groups are said to have a common bond, then there is no tautology—the members of each group share the same bond as the members of the other groups.

For example, because the NCUA defines an occupational group to mean the employees of a single employer, 58 Fed. Reg. at 40473, it is redundant to require that the workers at Company A have a common bond; their employment by Company A is their common bond and that bond is what makes them an occupational group. Suppose, however, that the employees of unaffiliated Company B propose to join the FCU at Company A. The Act clearly forecloses this possibility for want of a common bond among the employees. Now suppose that Company A buys Company B, which remains a separate subsidiary. Joint ownership of Companies A and B creates a common bond extending across the two groups; the employees of Company B could then become members of the FCU at Company A.

We do not dismiss out of hand the possibility that the term "common bond"—although supererogatory when applied to the membership of a single group—nevertheless reflected ordinary usage in 1934. Moreover, having dissected enough statutes to know that they may upon occasion have redundant

terms, *see, e.g., American Fed'n of Gov't Employees, Local 3295 v. Federal Labor Relations Auth.*, 46 F.3d 73, 77 (D.C. Cir. 1995) ("no construction of § 1462a [of the Federal Deposit Insurance Act] can avoid rendering either subsection (1) or subsection (2) redundant"), we look further before deciding with confidence that § 109 is unambiguous on its face.

FNBT's second textual argument is that the term "groups" in the two parallel provisions of § 109—permitting credit unions composed either of (1) "groups having a common bond of occupation" among all the members or of (2) "groups within a well-defined neighborhood, community, or rural district"—must be interpreted in a consistent way. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2455 (1992). If the so-called community provision were construed in a manner consistent with the NCUA's revised interpretation of the occupational provision, then a single FCU could include residents of any number of "well-defined neighborhood[s], communit[ies], or rural district[s]" around the country. Yet this expansive construction has never been advocated by the NCUA; on the contrary, the NCUA regulation implementing the community provision expressly requires that all FCU members live, worship, or work in "a single, geographically well-defined area." 59 Fed. Reg. at 29077.

The NCUA answers this argument by noting that the two grammatically parallel provisions of § 109 do not, upon close inspection, use the same terms: "the limitation of geographic groups to those 'within' a defined area," we are told, "clearly supports the NCUA's conclusion that membership in a community credit union may not consist of groups from widely dispersed locales." So it does; no one disputes the correctness of the NCUA's restrictive interpretation of the community clause. But the NCUA's point is not at all responsive to FNBT's argument. The question is how "groups" can be given a different meaning in the two parallel phrases: "groups having a common bond of occupation" and "groups within a well-defined [area]." The statute does not allow multiple groups, each within a different neighborhood, to form a single community FCU. Nor therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer), to form an occupational FCU.

In sum, the FCUA requires by its terms that all members of a credit union share a single common bond. Our example of two companies under joint ownership meets that statutory requirement—and does so without including unrelated groups, which would drain the phrase "common bond" of all meaning. The NCUA may identify and approve other types of common bonds, subject only to the rule of reason embedded in *Chevron* step two. Indeed, the agency might define an occupational group differently—*e.g.*, all workers in the same trade—and perhaps pass muster under *Chevron*. Alternatively, the NCUA may allow multiple occupational groups to form an FCU under a common bond of "association," if one can be found. If the statute is to be read as it is written, however, the one thing that the agency may not do is permit unrelated groups to form a single FCU unless a common bond unites all of the members.

To test the hypothesis that the common bond provision means what it says, we consult briefly the purpose of the statute and its legislative history.

B. The Purpose of § 109

First let us dispatch the suggestion of the North Carolina Alliance of Community Financial Institutions, a trade association that filed an *amicus* brief in support of FNBT, that the Congress intended the common bond provision to foreclose unfair competition between credit unions, which are tax exempt, and banks, which are not. ("Without a meaningful common bond provision, credit unions are merely banks with a leg up on other banks.") According to the Alliance, a principal purpose of the common bond is to constrict the market that credit unions can serve, thereby limiting the threat that they pose to banks. We squarely rejected this argument on the first appeal of this case: "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because

Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." 988 F.2d at 1275. Only "as time passed—as credit unions flourished and competition among consumer lending institutions intensified—[did bankers begin] to see the common bond requirement as a desirable limitation on credit union expansion." *Id.* at 1276.

FNBT itself makes a more persuasive argument based upon the purpose of the common bond requirement. The Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to "ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could 'loan on character.'" *Id.* There can be little doubt that growth on the scale achieved by ATTF is inconsistent with that purpose.

The NCUA points out that under its regulations a new group is not permitted to join an existing FCU unless the members are within an area that can reasonably be served from an existing or proposed office of the credit union. *See* 54 Fed. Reg. at 31170. This administrative policy might initially seem to blunt FNBT's claim that under the NCUA's current interpretation of the common bond requirement an FCU could accept anyone as a member simply because he or she is employed. Upon closer inspection, however, the agency's point is a makeweight. For whatever restraining force the common bond requirement retained after NCUA changed its interpretation of the Act in 1982, it did not impede ATTF's dramatic expansion. Indeed, as recently as 1985, ATTF's field of membership consisted basically of the employees of five AT&T affiliates who worked in, or were supervised from, certain areas within North Carolina or Virginia.

In short, reading § 109 as the 73d Congress wrote it, *i.e.*, to require that a single common bond be shared among all members of an occupational credit union, furthers the overriding purpose of the FCUA—to "unite[ ] credit union members in a cooperative venture." *First Nat'l Bank and Trust*, 988 F.2d at 1276; the NCUA's reading, which permits multiple unrelated groups to form an occupational FCU, frustrates that purpose. If this conception of an FCU seems dated in the world of ATMs and nearly nationwide financial institutions of a scale surely unimaginable in 1934, *see* Douglas H. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133 (1981), then the case for updating the FCUA must be addressed to the Congress.

C. The Legislative History of § 109

Finally, we look to the legislative history of the FCUA only to determine whether it so convincingly contradicts our interpretation of the text, reinforced by our understanding of the purpose of the statute, as to require that we rethink the matter. Under these circumstances, only a show stopper would do.

FNBT emphasizes the Report of the Senate Committee on Banking and Currency, which defines a credit union, in part, as "a cooperative society ... limited in each case to the members of *a specific group with a common bond* of occupation or association." S. REP. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis supplied). The NCUA and ATTF extract their version of the legislative history from the Report of the House Committee on Banking and Currency, which paraphrases § 109 as providing that "[m]embership in Federal credit unions is limited to *groups having common bonds* of occupation or association." H.R. REP. No. 2021, 73d Cong., 2d Sess. 3 (1934) (emphasis supplied); *cf.* MARY ANN GLENDON, A NATION UNDER LAWYERS 197 (1994) (quoting Karl Llewellyn: "Never paraphrase a statute"). Thus do the parties replay their jejune debate over the use of a singular article and a plural noun in the statute itself. Not surprisingly, therefore, the NCUA ultimately joins in the district court's conclusion that the legislative history of the common bond requirement is "murky" and provides only "a slender reed on which to place reliance." 863 F. Supp. at 12. Whatever the precise

exchange rate between the metaphors may be, a slender reed is not a show stopper.

The district court itself assigned some weight to "the fact that Congress has not objected to ... the [NCUA's] 1982 expansion" of the common bond requirement. 863 F. Supp. at 18. In a *Chevron* step two analysis, where the issue is whether the agency's interpretation of the statute is reasonable, congressional inaction might be minimally enlightening. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983). This is a *Chevron* step one analysis, however; the silence of a later Congress says nothing about the intent of the earlier Congress that spoke directly to the question here at issue.

III. Conclusion

Based upon the text and the purpose of the FCUA, we conclude under *Chevron* step one that all the members of an FCU must share a common bond. If there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only.

Accordingly, we reverse the judgment of the district court. The case is remanded to that court for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. 90-2948

FIRST NATIONAL BANK AND TRUST CO., et al.,
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION et al.,
Defendants.

Decided Sept. 15, 1994.

A. Douglas Melamed, Wilmer, Cutler & Pickering, Washington, DC, for plaintiffs.

Paul J. Lambert, Bingham, Dana & Gould, Washington, DC, for defendants-intervenors.

Kenneth L. Doroshow, U.S. Dept. of Justice, Washington, DC, for defendants.

MEMORANDUM OPINION

Opinion for the court filed by District Judge PRATT.

On September 9, 1994, this Court conducted a hearing to consider whether the National Credit Union Administration's

("NCUA") interpretation of the "common bond provision" in the Federal Credit Union Act ("FCUA") [1] conflicts with the clear intent of Congress or whether the Court must defer to the NCUA's interpretation. The issue has been well-briefed on both sides. Based on the arguments and authorities presented by the parties in their briefs and during the hearing, we defer to the NCUA's interpretation of the common bond provision. Plaintiffs' renewed motion for summary judgment is denied and defendants' summary judgment motions are granted.[2]

I. Background

In 1991, the Court determined that plaintiffs did not have standing to challenge the agency decision because they were not the intended beneficiaries of the FCUA and because Congress did not intend to protect competitive interests. 772 F.Supp. 609 (D.D.C.1991) (Harris, J.). The Court of Appeals reversed, 988 F.2d 1272 (D.C.Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 288, 126 L.Ed.2d 238 (1993), and the matter now comes before the undersigned judge for consideration on the merits.

Plaintiffs, four North Carolina banks and the American Bankers Association, challenge the NCUA's approval of several applications by AT & T Family Federal Credit Union ("AT & T Family") to expand its membership to include the employees of unrelated employers in several areas of the

[1] 12 U.S.C. § 1751 *et seq.*, particularly § 1759.

[2] Defendants filed two separate summary judgment motions. The first was filed by the NCUA and the second by AT & T Family Federal Credit Union and Credit Union National Association.

United States. Plaintiffs, which are conventional banks and their trade association, contend that they are suffering from the competition caused by the expansion of AT & T Family. At the September 9th hearing, the Court concluded that it was impossible to consider the validity of the application approvals by the NCUA without examining its interpretation of the common bond provision. The remainder of this opinion will focus on the common bond provision and whether the NCUA's interpretation conflicts with Congress' intent.

Congress first authorized federal credit unions during the Great Depression. It will be recalled that in March 1933, President Roosevelt found it necessary to close all banks and that the woeful state of the nation's banking system during the early 1930s left large segments of the population without access to necessary credit. Congress reviewed the then existing system of state licensed credit unions and determined that federal credit unions would improve access to credit for people of "small means." S.Rep. No. 55, 73d Cong., 2d Sess. 1 (1934). The basic statute was passed at that time.

By definition, a federal credit union is owned by its members and can issue loans only to its members or to other credit unions. 12 U.S.C. § 1757. To insure sound loan policies in an era before deposit insurance,[3] Congress restricted membership to "groups having a common bond of occupation or association." *Id.* § 1759. The original purpose behind the common bond provision was twofold: to insure the financial stability of credit unions by providing a sense of cohesiveness among members and by enabling the members to establish a borrower's credit worthiness at minimum cost; and to promote

[3] Federal credit unions have only been covered by deposit insurance (called "share insurance") since 1970.

the growth of credit unions because it was faster and easier to form a credit union with members who already had a common bond.

Until 1982, the NCUA and its regulatory predecessors interpreted the common bond provision as requiring that the members of each credit union have a single common bond with each other, although beginning in the 1960s, the NCUA began expanding the criteria for determining common bond in response to changing economic conditions. For example, in 1968, the NCUA permitted a "once a member always a member" inclusion under common bond. General Accounting Office, Credit Unions: Reforms for Ensuring Future Soundness 217 (1991) (hereafter "GAO Report"). The NCUA has followed a broader interpretation of "common bond" since 1982 which allows multiple unrelated groups to join the same credit union if each group has a common bond among its members.

The expansion of AT & T Family is premised on this interpretation which plaintiffs now challenge.[4] Plaintiffs seek injunctive and declaratory relief vacating all AT & T Family membership approvals since November 14, 1989.[5] Relief is sought on the theory that the NCUA's approval of the membership expansions violates the Administrative Procedure Act ("APA").[6] 5 U.S.C. § 706.

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[4] AT & T Family serves the employees of 150 unrelated employers, and has assets of more than $267,800,000.

[5] The relevance of this date has not been made known to the Court.

[6] The APA allows the reviewing court to set aside agency action found to be "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law." § 706(2)(A).

II. Analysis

[1] There are no material questions of fact precluding summary judgment in this case. The Court's review of an agency's interpretation of a statute must follow "the well-trodden path carved out in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 [104 S.Ct. 2778, 81 L.Ed.2d 694] (1984)." *Northwest Airlines, Inc. v. U.S. Dept. of Transportation*, 15 F.3d 1112, 1118 (D.C.Cir.1994). The first prong of the Chevron formulation, often called "*Chevron I*, " asks whether the Court, armed with the traditional tools of statutory construction, ... can ascertain clear congressional intent on the *precise* issue before us.

Id. (*emphasis added*). If the statutory language is silent or ambiguous on this specific issue, the Court then proceeds to the second prong of the Chevron formulation, "Chevron II." *Doe v. Sullivan*, 938 F.2d 1370, 1381 (D.C.Cir.1991). Under *Chevron II*, the Court must determine whether the agency's interpretation of the statute is a reasonable one. We are required to defer to the agency's construction of the statute as long as it is reasonable or permissible. Id.

A. Chevron I: Congressional Intent

1. The Language of the Statute

[2][3] The Court looks first to the language of the statute itself in establishing whether Congress intended to limit credit union membership to individuals having a single common bond.[7] *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 892 n. 86 (D.C.Cir.1987) ("the best guide to what a statute means is what it says ") (emphasis in original). Plaintiffs argue that the common bond provision should be read in the singular, i.e., that each credit union shall have a single common bond. Defendants counter that the reference to "groups" proves that Congress contemplated multiple groups within a single credit union.

The Court concludes that either interpretation is plausible. The first portion of the statute appears to use "federal credit union membership" in the singular as it requires each member to "subscribe to at least one share of its [the credit union's] stock." It is plausible that the second reference to "Federal credit union membership", in the common bond phrase, is also meant in the singular, but then contemplates several "groups" within that one credit union. A "court must look to the particular statutory language at issue, as

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[7] The relevant portion of the statute at issue reads as follows: Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by [the NCUA], as may be elected to membership and as such shall each, subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to *groups* having a common bond of occupation or association....§ 1759 (*emphasis added*).

well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991). Therefore, a reasonable reading of the common bond provision is that a credit union may have several groups, each with its own common bond. [8]

Plaintiffs counter that such a reading of the statute would permit limitless growth by federal credit unions and frustrate the limitations evident in the statutory language. We disagree. "Whereas almost all private business will serve any customer, the 'customers' of each federal credit union ... are expressly 'limited to groups having a common bond.' " *United States v. Michigan*, 851 F.2d 803, 807 (6th Cir.1988). Each group must "be employed by the same enterprise" or belong to the same association that has "common loyalties" and holds yearly meetings.[9] 54 Fed.Reg. 31169.

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[8] The Court disagrees that other federal courts have held to the contrary. In all but one of the cases cited by plaintiffs, the common bond provision was not at issue in the case. *See e.g. Sister of the Presentation of the Blessed Virgin Mary v. NCUA*, 961 F.2d 733 (8th Cir.1992) (determining whether credit union member was an "equity holder" or a "creditor"). The one case that discussed the common bond provision in any detail, *Bd. of Dir. Forbes Federal Credit Union v. NCUA*, 477 F.2d 777 (10th Cir.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 233, 38 L.Ed.2d 158 (1973), was issued prior to the NCUA's 1982 interpretation. In addition, the case concerned an attempt by a credit union to reinterpret its single common bond, not an attempt to reinterpret the concept of a "common bond" by adding unrelated groups.

[9] There are other limits on the expansion of credit unions. *See e.g.*, 54 Fed.Reg. 31176 (enumerating various limitations); GAO Report at 219- 20.

[4] When an agency's interpretation is one of two plausible alternatives, the statute is ambiguous. *International Union, UMW v. Federal Mine Safety and Health Admin.*, 920 F.2d 960, 963 (D.C.Cir.1990) (statute is ambiguous if it does "not clearly preclud[e]" the agency's approach). Next we look to the legislative history for a possible resolution of this ambiguity.

2. Legislative History of the Common Bond Provision

The legislative history concerning the common bond provision is predictably murky and is a slender reed upon which to place reliance. "Congress did not ... elaborate on th[e] definition [of the common-bond provision] at the time [the FCUA was debated] or express the reason for the requirement." GAO Report at 217.[10] Both sides point to isolated portions of the record; particularly to the differing language in the Senate and House of Representatives committee reports of 60 years ago.

Plaintiffs rely on a statement from a 1934 Senate Report in which the Committee describes credit unions as, *inter alia*, "limited in each case to the members of a specific group with a common bond of occupation or association." S.Rep. No. 555, 73d Cong., 2d Sess. (1934). In context, however, this statement may well be little more than a description of the field of state credit unions as they existed in 1934. It appears to be a descriptive rather than

[10] *See also NCUA, Studies in Federal Credit Union Chartering Policy 12 (1979)* (hereafter "NCUA Report") ("There is very little in the legislative history that can be characterized as a[n] insightful, analytic discussion of the essence of the [common-bond] phrase, and of its intended scope and application"); *A. Burger & T. Dacin, Field of Membership: An Evolving Concept* (2d ed. 1992).

exhaustive statement and not meant to define the limits of credit union organization. NCUA Report at 14.[11]

[5] Defendants seize upon the House Report which indicates that "[m]embership in Federal credit unions is limited to groups having common bonds of occupation or association or to groups within well-defined communities." H.R.Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934). We are equally unwilling to overemphasize the importance of this statement. The legislative record, taken as a whole, does not provide the clear and certain indication that Congress intended to preclude the NCUA's current interpretation of the common bond provision. *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S.Ct. 1759, 1768, 114 L.Ed.2d 233 (1991); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1057 (D.C.Cir.1981).

[6] What remains evident is the overall congressional intent to promote the creation and growth of credit unions. *First Nat'l Bank & Trust*, 988 F.2d at 1275 ("Congress' general purpose was to encourage the proliferation of credit unions"). It is readily apparent that the common bond provision was not the defining characteristic of a credit union.[12] *Barany v. Buller*, 670 F.2d 726, 734 (7th Cir.1982) ("[t]he salient feature of credit unions is their democratic control and management"); S.Rep. No. 555, 73d Cong., 2d Sess. 8 (1934) ("the sole purpose in the bill is to protect credit unions from further losses from the

[11] It should be noted that although this report was prepared by defendant NCUA, it predates by three years the interpretive change at issue in this case.

[12] The common-bond concept does not appear anywhere in the statutory definition of a credit union. See 12 U.S.C. § 1752(1).

failure of banks which constituted the greatest source of loss to credit unions during the depression"). In determining the meaning of a specific provision, the Court must look to the provisions of the entire law, and to its object and policy. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987).

[7] The common bond provision was not an end in itself, but its purpose was to support the underlying policy of promoting stable credit unions. It also suggests that Congress intended a flexible interpretation of the provision.[13] This assumption is supported by the fact that Congress has not objected to either the original agency interpretation or the 1982 expansion.[14] "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." *United States v. Riverside Bayview Homes,*

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[13] The Court rejects plaintiffs' contention that the NCUA policy is contrary to Congress' intent simply because the policy may represent a change from nearly 50 years of prior interpretation. Rust, 500 U.S. at 186, 111 S.Ct. at 1769 ("[t]his Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question") (citing *Chevron*, 467 U.S. at 862, 104 S.Ct. at 2791); see also *Nat'l Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230-31 (D.C.Cir.1992) ("[a]n agency, in light of changed circumstances, is free to alter the interpretive and policy views reflected in regulations construing an underlying statute, so long as any changed construction ... is consistent with express congressional intent or embodies a 'permissible' reading of the statute").

[14] Congress was repeatedly made aware of the revised common bond interpretation by the NCUA, by lobbyists from the banking industry, and by the GAO. *See e.g. NCUA 1982 Annual Report to Congress*, 1; GAO Report at 218-19.

Inc., 474 U.S. 121, 137, 106 S.Ct. 455, 464, 88 L.Ed.2d 419 (1985).

The NCUA was given a mandate to "provide more flexible and innovative regulation" in the face of changing economic conditions. S.Rep. No. 91-518, 91st Cong., 2d Sess. (1970), U.S.Code Cong. & Admin.News 1970, p. 2479, 2481. Such economic changes require only brief discussion. For example, until 1970, share accounts in federal credit unions were not insured. Until that time, a restrictive definition of "common bond" served the goal of individualized loan decisions by members who knew one another. See GAO Report at 231. Now that share accounts are insured, the NCUA, and it appears Congress as well, has determined that larger credit unions can better spread the risk of loan defaults. *See e.g. id.* at 219 (FCUA amended in October 1992 to allow the NCUA to merge or transfer assets of credit unions in danger of insolvency).

In sum, the congressional record does not provide a clear indication that Congress intended to limit each credit union to a single group sharing a common bond. In the face of such ambiguity we cannot conclude that Congress precluded the NCUA's interpretation of the common bond provision. Therefore, it is necessary to determine whether this interpretation is reasonable.

B. Chevron II: Reasonableness of the NCUA's Interpretation

[8] It is well established that, in case of ambiguity, we must defer to the agency's interpretation if it is a reasonable one. Plaintiffs have not seriously argued that the interpretation under challenge is unreasonable. Indeed, it

would be a daunting task for them to do so. The NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions. For example, NCUA policy requires that groups seeking to form credit unions have at least 500 members. Many of the recent additions to AT & T Family are companies employing far fewer than 500 people. Employees in small companies have gained the access to credit unions that they would be denied under plaintiffs' interpretation.

III. Conclusion

The Court concludes that the NCUA's interpretation of the common-bond provision is a reasonable construction of an ambiguous statute. We acknowledge that it is debatable whether credit unions the size of AT & T Family continue to need the special protection afforded by the FCUA. However, this is a policy matter best left to Congress. Until Congress addresses this matter, the Court will defer to the agency's interpretation of the statute at issue. Plaintiffs' renewed motion for summary judgment is denied and defendants' motions for summary judgment are granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 91-5262, 91-5336

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,
Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,
Lexington State Bank,
Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION

Argued Nov. 16, 1992

Decided April 2, 1993

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* * * *

Michael S. Helfer, with whom William J. Kolasky, Jr., John J. Gill, and Michael F. Crotty, were on the brief, for appellants.

Jonathan R. Siegel, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jay P. Stephens, U.S. Atty., and Douglas N. Letter, Atty., Dept. of Justice, were on the brief, for appellees.

Edward C. Winslow and William C. Scott were on the brief, for amicus curiae North Carolina Alliance of Community Financial Institutions.

Before: WALD, SILBERMAN, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Concurring opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

Appellants, four North Carolina banks and the American Banking Association, challenged the National Credit Union Administration's (NCUA) approval of several recent applications by AT & T Family Federal Credit Union (AT & T Family) to expand its membership. According to appellants, the NCUA's decisions violated the requirement of the Federal Credit Union Act (FCUA) that membership in federal credit unions be limited to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. The banks complain that, by allowing AT & T Family improperly to extend its membership and thereby its number of potential borrowing customers, the NCUA has made the credit union a formidable competitor. The district court applied the "zone of interests" tests for prudential standing and determined that appellants lacked standing to sue. Although we agree with the district court that the appellants were not intended beneficiaries of the FCUA, we think that they are suitable challengers because the statute arguably prohibits the competition of which they complain. This case thus falls within the rationale of *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). We reverse and remand to the district court.

I.

Passed in 1934 in the midst of the Great Depression, the FCUA, 12 U.S.C. §§ 1751-1795k (1988), was designed

to improve access to credit for people of "small means." S.REP. No. 555, 73d Cong., 2d Sess. 1 (934). For many working Americans, credit at reasonable rates had essentially disappeared in the years following the stock market crash. Lacking the security necessary to obtain loans from banks, working Americans turned to loan sharks who typically charged usurious interest rates, which was thought to reduce the overall purchasing power of American consumers. *See* 78 CONG.REC. 12,223 (1934). Congress saw the solution to this problem in a system of federal credit unions that would provide credit at reasonable rates and thus would help spur economic recovery. *See id.* at 7260, 12,223-25.

To ensure that credit unions fulfilled their purpose of meeting members' credit needs, Congress restricted credit unions' management and business activities. For example, a federal credit union is owned and controlled by its members, *see* 12 U.S.C. §§ 1757-1761, and it can make loans only to members or to other credit unions, *see id.* § 1757(5). Congress expected that such measures guaranteeing democratic self-government would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs.

A related provision of the FCUA, the common bond requirement, is at the heart of this case. Section 109 of the Act restricts membership in federal credit unions to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. For much of the Act's history, the NCUA interpreted this provision to require all members of a credit union to share the same bond. In the 1980s, however, the NCUA issued a series of Interpretive Ruling and Policy Statements (IRPS) construing the statute to allow a number of different groups, each having its own bond, to form a credit union, even though no overall common bond united the different groups. *See* 47 Fed.Reg. 26,808 (1982) (IRPS 82-8); 48 Fed.Reg. 22,899 (1983); 49 Fed.Reg. 46,536 (1984) (IRPS 84-1); 54 Fed.Reg. 31,165

(1989) (IRPS 89-1). The NCUA's most recent interpretation, IRPS 89-1, made clear that a credit union could comprise a "combination of distinct, definable occupational and/or associational groups." 54 Fed.Reg. 31,165, 31,170 (1989).

Appellants challenged several decisions in which the NCUA applied IRPS 89-1 to approve applications by AT & T Family to expand its field of membership. Until recently, AT & T Family's membership consisted primarily of employees of AT & T Technologies, Inc., AT & T Network Systems, and Bell Telephone Labs. In late 1989 and 1990, AT & T Family filed eight applications to extend its membership to include groups of employees from other companies such as the American Tobacco Company, Western Auto Supply Company, and WGHP-TV, to name but a few. In all, the NCUA approved the extension of AT & T Family's membership to 16 new employee groups. Appellants claimed before the agency and in the district court that IRPS 89-1, ignored the statutory language by allowing groups lacking any common bond between them to join together in a credit union. The banks contended that by allowing AT & T Family to expand to 71,000 members in violation of the statute, the NCUA has allowed the credit union, which is exempt from state and federal income taxes, *see* 12 U.S.C. § 1768, to become a formidable competitor to banks.

The district court granted NCUA's motion to dismiss for lack of standing. The court determined that appellants were not pressing claims "arguably within the zone of interests' protected by the FCUA. *See First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 772 F.Supp. 609, 611-13 (D.D.C. 1991). Relying on the language of this court's post-*Clarke* decisions on prudential standing,f *see, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C.Cir. 1989) (*HWTC IV*); *Hazardous Waste Treatment Council v. United States Envtl. Protection Agency*, 861 F.2d 277 (D.C.Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*), the

district court said that "[t]hose not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless 'suitable challengers' to the statute, because their interests coincide with the interests which Congress did intend to protect." *First Nat'l Bank*, 772 F.Supp. at 611. The banks were not intended beneficiaries of the Act, thought the district court, because "the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks." *Id.* at 612; *see also Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). Under applicable precedent, the district court believed that the banks were not suitable challengers either. Because the banks and the credit union competed for the same business, any coincidence in their interests "would be at best fortuitous." *First Nat'l Bank*, 772 F.Supp. at 612. The banks, according to the district court, could not rely on the Supreme Court's cases, *see, e.g., Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971) (*ICI*); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that granted standing to competitors as suitable challengers because, unlike the competitors in those cases, the banks were not suing under an entry-restricting statute. *See First Nat'l Bank*, 772 F.Supp. at 613.

II.

It should be noted that no one questions appellants' Article III standing; that appellants will suffer competitive or economic injury is not in doubt. The question before us is whether under the FCUA the banks can claim prudential standing as well. In other words, are they pursuing an interest (not just an objective), *see HWTC IV*, 885 F.2d at

925,[1] arguably within the zone of interests Congress intended either to regulate or protect, and, thus, are they among the class of persons entitled to sue to enforce FCUA's restrictions? *See Clarke*, 479 U.S. at 396, 107 S.Ct. at 755; *Data Processing*, 397 U.S. at 153, 90 S.Ct. at 829. This "zone of interests" test ensures that standing is granted only to plaintiffs who will not distort congressional objectives. It excludes those plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757. Because the banks are not regulated by the common bond requirement, we must inquire whether the banks can be thought to have been "protected" by that statutory limitation on the activities of credit unions. Litigants can qualify as "protected" by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers, *see HWTC IV*, 885 F.2d at 923-24; that is, if their interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not "more likely to frustrate than to further the statutory objectives." *Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12.

Appellants claim that they qualify both as intended beneficiaries and as suitable challengers under the FCUA. We agree with the district court, however, that Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdain. *See* 78 CONG.REC. 7259 (1934) (statement of Sen. Barkley) ("[B]ank[s] . . . cannot extend credit to many of

[1] In *HWTC IV*, we emphasized that "It is the interests that the challenger seeks to protect and not the challenge with which we must be concerned." *HWTC IV*, 885 F.2d at 925.

these people, because they do not have the required security."); *id.* at 12,225 (statement of Rep. Luce) (noting that credit unions would serve those "who do not use and cannot use banks . . . for small borrowings"). The common bond requirement, an existing characteristic of state credit unions, was designed, in combination with the restriction that permitted credit unions to loan only to members, to ensure that credit unions would effectively meet members' borrowing needs. It would seem, therefore, that Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could "loan on character." *See id.* at 12,223. The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.[2]

To be sure, as time passed—as credit unions flourished and competition among consumer lending institutions intensified—bankers began to see the common bond requirement as a desirable limitation on credit union expansion. To that end, in the 1970s bankers, according to appellants, became active in lobbying Congress to urge the maintenance of the common bond requirement. But that fact, assuming it is true, hardly serves to illuminate the intent of the Congress that first enacted the common bond requirement in 1934. And we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks.

There remains, however, the more subtle question, whether banks can be thought suitable challengers to en-

[2] The Senate report on the bill praised credit unions for their record of successful service during the Depression, a record that contrasted sharply with a grim history of bank failures, and attributed the success largely to credit unions' self-government and attentiveness to members' needs. *See* SEN.REP. No. 555, 73d Cong., 2d Sess. 2-4 (1934).

force a requirement designed to benefit the members—particularly potential borrowers—of credit unions. Appellants rely on the Supreme Court's reasoning in *ICI* and *Clarke*, and it seems to us the parallels between those cases and the present one are striking. In *ICI* the securities industry challenged a ruling by the Comptroller of the Currency that would have permitted banks to slip the Glass-Steagall leash and enter what was considered a part of the securities business. *See ICI*, 401 U.S. at 618-19, 91 S.Ct. at 1092-93. As the Supreme Court later explained in *Clarke*, the Glass-Steagall Act, which limited the securities underwriting and investment activities of banks, was designed to protect bank depositors from risky bank activities—not to insulate investment bankers, or indeed, any noncommercial bankers, from competition. *See Clarke*, 479 U.S. at 398 & n. 13, 107 S.Ct. at 756 & n. 13. Nevertheless, because the investment bankers pursued interests congruent with those of the intended beneficiaries, they were permitted to sue in *ICI* to enforce Glass-Steagall's restrictions on banks.

Similarly, in *Clarke* the ever-vigilant securities industry was permitted to challenge a Comptroller decision that authorized a national bank to offer discount brokerage services not only at its established branches, but also at locations both inside and outside the bank's home state. The challenge was based on the McFadden Act, which restricts the interstate branching of national banks. *See Clarke*, 479 U.S. at 391, 107 S.Ct. at 752. The Act was designed to establish competitive equality between national and state banks and thus to protect smaller banks from competition from out-of-state leviathans, *see First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343 (1966), not to protect investment bankers. Nevertheless, the investment bankers had standing to sue. The Supreme Court relied on the correlative congressional objective of preventing national banks from gaining too much ("monopoly") control over credit and money through

"unlimited branching." *Clarke*, 479 U.S. at 402, 107 S.Ct. at 758. Given that general congressional purpose, the Court thought that the securities industry, which was a competitor at least with respect to discount brokerage services, was a suitable challenger. In other words, even though the Congress that passed the McFadden Act was not at all concerned with the spread of discount brokerage—only branch-banking—and the securities industry was a competitor with regard to the former, not the latter, it was nevertheless permitted to challenge the spread of discount brokerage through the McFadden Act, again because of the congruence of plaintiffs' interests with those of the intended beneficiaries.

We take from these cases the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.[3] The limitations may be restrictions on entry—geographic or product line—or they might be, as in our case, limitations on growth, which are akin to entry restrictions. Like more classic entry restrictions, the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market.

We previously have recognized the particular significance of statutory entry restrictions on prudential stand-

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[3] We cannot agree with the pre-*Clarke* reasoning of *Branch Bank & Trust Co. v. National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), in which the Fourth Circuit focused exclusively on the question whether banks' interests were intended to be protected under the FCUA and concluded that banks do not have standing under the FCUA, *see id.* at 626. The subsequent explication of the suitable challenger route to standing in *Clarke* empties the *Branch Bank* decision of its persuasiveness.

ing. In *HWTC II*, we distinguished the case before us from the Supreme Court's cases granting standing to competitors (*Data Processing*, *ICI*, and *Clarke*), on the grounds that it did not involve an "entry-restricting" statute. *See HWTC II*, 861 F.2d at 284. Similarly, in *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration*, 822 F.2d 1105 (D.C.Cir. 1987), we noted that "[c]ompetitors have a seemingly unbroken record of success in securing standing" in cases involving regulatory systems that "restrict[] entry into a particular field or transaction." *Id.* at 1109. Indeed, the district court attempted to distinguish this case from *ICI* and *Clarke* on the grounds that the common bond requirement was not an entry restriction.[4] *See First Nat'l Bank*, 772 F.Supp. at 613.

Appellees, sidestepping the entry-restriction cases, rely primarily on our refinement of prudential standing analysis in *HWTC IV*. In that case, an organization of companies that treated hazardous waste and marketed products derived from processed waste sued to force the EPA to adopt stricter environmental regulations on other companies so as to create a greater market for their own services and products. We held that HWTC's interests (irrespective of its particular objectives in the case before us) were not sufficiently congruent with those of the intended beneficiaries of the statute to make HWTC a suitable challenger. *See HWTC IV*, 885 F.2d at 924. The treatment firms' interest was in selling more services and equipment to the regulated companies, and therefore the firms would seek regulations that would increase demand for their product regardless of the effects on the statute's intended bene-

[4] We have expressed concern in the past about allowing potential plaintiffs to gain standing through a facile assertion that they are enforcing entry-restricting legislation (a concern that again highlights the importance we have implicitly attached to entry restrictions in standing cases). *See HWTC II*, 861 F.2d at 284. This, of course, is not such a case.

ficiaries. We concluded that to have standing under the statute, HWTC would have to have shown a systematic alignment of interests with the statute's beneficiaries, *see id.* at 924, a standard that appellees understandably claim was stricter than our prior characterization of *Clarke* as a test requiring "less than a showing of congressional intent to benefit but more than a marginal relationship to the statutory purposes." *HWTC II*, 861 F.2d at 283.

Our decision did not rest on a conclusion that the economic interests of the treatment first were somehow less deserving than the environmental interests the statute was designed to foster; nor was it based on a view that the firms' economic incentives were inherently less worthy than the economic objectives of the securities industry plaintiffs in *ICI* and *Clarke*. On the contrary, the economic motivations could be thought analogous. If the watchword of the treatment firms in *HWTC IV* was "treatment is good and more treatment is better," *HWTC IV*, 885 F.2d at 925, it might be said that the watchword of all competitors with regard to their potential rivals must be "regulation is good and more restrictive regulation is better." And one cannot base standing on one's mere status as an economic beneficiary of government regulation of others. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Supreme Court said:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Id. at 883, 110 S.Ct. at 3186.

The distinction between *HWTC IV* and the Supreme Court's *Lujan* hypothetical on the one hand and *ICI* and *Clarke* on the other must be that in *ICI* and *Clarke* the potentially limitless incentives of competitors were channelled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation dividing the banking and securities industries. The interests the securities industry plaintiffs sought to protect were thus less open-ended and more confined than were the economic interests pursued in *HWTC IV*, and as a result there was a reduced danger of distorting congressional purpose. By contrast, nothing in the statute in *HWTC IV* could ensure that there would be any connection at all between the treatment firms' interests and the statutory purpose. "[T]here is not the slightest reason to think that treatment firms' interest in getting more revenue by increasing the demand for their particular treatment services will serve [the statute's] purpose of protecting health and the environment." *HWTC IV*, 885 F.2d at 924. There is, however, a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end. The restriction connects the economic interests of competitors to the purposes of the statute and yet constrains competitors to a limited role in guarding a congressionally drawn boundary. In these circumstances the plaintiffs can be thought to have interests "systematically aligned" with those the statute is designed to benefit.

The securities industry plaintiffs in *ICI* and *Clarke* were not seeking to impose new regulations on banks in areas unrelated to an existing, specific statutory norm simply to provide a demand for their services or to weaken banks as competitors.[5] We certainly would not accept as a suit-

[5] Perhaps it is also relevant—in considering whether a plaintiff has

able plaintiff a party who had only a general economic interest in harming a competitor and who, accordingly, sought to impose some new, more onerous regulation upon that competitor. *See, e.g., Calumet Indus., Inc. v. Brock*, 807 F.2d 225, 228 (D.C.Cir. 1986). But, when the plaintiff seeks to enforce a statutory restriction on his competitor—a restriction the plaintiff enjoys as well as the statutory beneficiaries—there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of a statutory scheme.

Our reasoning in *HWTC* suggests that our reaction might be different if the banks appeared before us, not asking to patrol the common bond picket line, but seeking a new regulation that would squeeze the credit unions into a smaller market or even eliminate them from the market altogether. It is unnecessary, however, to extend our holding into a definitive answer to appellants' hypotheticals; we concede that the general issue is devilishly complex. We feel confident, however, that this case is a good deal closer to the paradigm of *ICI* and *Clarke* than it is to *HWTC*, and, therefore, we hold that appellants have standing. The judgment of the district court is reversed and the case remanded.

WALD, Circuit Judge, concurring:

The panel opinion's analysis of precedents on "entry-restricting" statutes quite correctly concludes that, under circuit case law, as well as under the Supreme Court's directives in *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91

prudential standing, if not Article III standing, *see Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974)—to ask whether, as the Supreme Court may well have in *ICI*, one can be confident that the intended beneficiaries had sufficient incentive and organizational resources to sue. *See HWTC II*, 861 F.2d at 284.

S.Ct. 1091, 28 L.Ed.2d 367 (1971), plaintiff banks have standing to challenge the NCUA's interpretation of the common-bond requirement. I agree with my colleagues that, where an entry-restricting or analogous statute is involved, "a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may do so to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Panel opinion ("Panel op.") at 9.

I originally—and still—disagree, however, with the "suitable challenger" test articulated in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (1989) (*HWTC IV*), which requires a "systematic coincidence," *id.* at 924, or "systematic alignment," Panel op. at 10, 12, of interests between the would-be plaintiffs and the statute's intended beneficiaries. As I stated at the time, I find this test without roots either in Supreme Court law[1] or in the general purposes of standing. *See HWTC IV*, 885 F.2d at 927-34 (Wald, C.J., dissenting). I recognize, however, that this test is nonetheless part of our circuit law. In that context, I agree with the panel opinion that, when an entry-restricting or analogous statute "reflects a congressional judgment that the restraint on competition is the means to assure the statutory end," Panel op. at 11, and plaintiffs seek only to "enforce the statutory demarcation," *id.*, between the beneficiaries of a licensing scheme and their competitors, plaintiffs clearly satisfy the goal of the "suitable challenger" test, *i.e.*, to ensure that plaintiffs are

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[1] It should be noted that, while the Supreme Court in *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 F.Ct. 750, 93 L.Ed.2d 757 (1988), did determine that the securities industry was a "proper party" to challenge the Comptroller's decision to permit expanded bank activities, *id.* at 403, 107 S.Ct. at 759, it did so under its own "not . . . especially demanding" zone of interest test, *id.* at 399, 107 S.Ct. at 757, not under any "suitable challenger" test akin to that laid down in *HWTC IV*.

more likely to further than to frustrate the purpose of the statute. *See HWTC IV*, 885 F.2d at 925; *see also Clarke v. Securities Industry Ass'n*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12 (citing this as purpose of "zone of interest" test).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 90-2948 SSH

FIRST NATIONAL BANK AND TRUST COMPANY, Piedmont State Bank, Lexington State Bank, Randolph Bank and Trust Company, Bankers Trust of North Carolina, and American Bankers Association,
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Defendant,

and

AT & T Family Federal Credit Union and Credit Union National Association, Inc.,
Defendants-Intervenors.

Aug. 9, 1991

Michael S. Helfer, William J. Kolasky, Jr., Lance W. Edwards, John J. Gill and Michael F. Crotty, Washington, D.C., for plaintiffs.

Vaughn Finn and Theodore C. Hirt, Washington, D.C., for defendant.

Paul Joseph Lambert, Washington, D.C., for defendants-intervenors.

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiffs, five North Carolina banks and the American Bankers Association, challenge decisions by the National Credit Union Administration (NCUA) approving amendments to the charter of the AT & T Family Federal Credit Union (AT & T Family) expanding its field of membership. They allege that when the NCUA approved the amendments, it acted arbitrarily and capriciously, and violated the statutory requirement under the Federal Credit Union Act, 12 U.S.C. § 1751 *et seq.* (FCUA), that there be a "common bond of occupation or association" among the members of a federal credit union association. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202, they ask that various NCUA approvals of applications by AT & T Family be declared null and void and that defendant be enjoined from approving similar amendments to AT & T Family's charter. Now before the court are defendant's motion to dismiss for lack of standing and plaintiffs' opposition thereto. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

BACKGROUND

The Federal Credit Union Act was passed in 1934, in the wake of the Great Depression. After the crash, access to credit had been virtually eliminated for the great majority of the working class: most potential borrowers lacked the security to acquire a loan from a bank, and other licensed money lenders were able to charge extremely high interest rates. S.Rep. No. 555, 73d Cong., 2d Sess. 3 (1934); *see also* 78 Cong.Rec. 7259 (1934). Without access to credit, the nation's lower and middle classes saw their buying power spiral downward. S.Rep. No. 555 at 3.

The establishment of national credit unions, modelled after state supported organizations which had thrived through the economic chaos of the Depression, was seen as a "happy medium" between the loan shark and the bank. 78 Cong.Rec. 7259 (1934). Congress expected that members of credit unions, "with their own money and

under their own management," would be able to solve their own credit difficulties. S.Rep. No. 555 at 2. It was hoped that with access to small amounts of funds at reasonable interest rates, national credit unions would return significant buying power to those otherwise unable to have it. *Id.* at 1. Though state-sponsored credit unions fulfilled this need in some areas, Congress felt that the nation would benefit from a federal system because it would be capable of rapid expansion and would permit the creation of credit unions in states that did not previously authorize them. *Id.* at 2, 3.

The credit union is distinctive in that it is the members who own and control the organization. Members purchase shares in the credit union and exercise control over it democratically, irrespective of the number of shares held. 12 U.S.C. §§ 1757(6), 1760 (1988). Loans may be made only to members of the organization or to other credit unions. § 1757(5). Each credit union is managed by a board of directors elected annually by and from the members, and no member of the board receives any compensation for these services. § 1761. Supervision and chartering of credit unions is entrusted to the Board of the National Credit Union Administration (NCUA), a three-member panel appointed by the President upon the advice and consent of the Senate. §§ 1752a, 1754, 1756.

At issue in this case is § 109 of the FCUA, now codified at 12 U.S.C. § 1759, which provides that members of a credit union must share "a common bond" of occupation, association, or location. The NCUA has defined a common bond as:

> the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public. This unifying factor must be something more than an unfocused, generalized agreement on a given topic, or

> a common belief or philosophy on matters of general concern.

45 Fed.Reg. 8285 (1980).

In recent years the NCUA has interpreted the common bond requirement to allow a number of occupational or associational groups to form a credit union if each group shares its own common bond. *See* 12 C.F.R. § 701.1 (1991); 54 Fed.Reg. 31,169 (1989). Plaintiffs challenge decisions by the NCUA approving applications by AT & T Family to expand its membership to include employee groups that have a separate common bond from the AT & T employee group. Defendant moves to dismiss for lack of standing to sue under its FCUA, and is joined in that motion by intervenors AT & T Family and Credit Union National Association, Inc.

DISCUSSION

The Administrative Procedure Act (APA) grants standing to anyone "adversely affected by agency action within the meaning of the relevant statute."[1] 5 U.S.C. § 702. In *Association of Data Processing Service Organizations v. Camp,* the Supreme Court explained that a party meets this standard if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in ques-

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[1] In order to bring their claim, plaintiffs must show that they have both constitutional and prudential standing. *See National Federation of Federal Employees v. Cheney,* 883 F.2d 1038, 1041 (D.C.Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990). To establish constitutional standing, a plaintiff must allege an injury-in-fact which is fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *See Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Because the court dismisses the amended complaint for lack of prudential standing, it need not address the issue of Article III standing.

tion." 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Since *Data Processing*, the "zone of interests" test has been the standard by which the Court has judged questions of standing under § 702 of the APA.

The Court clarified what it means for a complainant to be within the "zone of interests" of a statute in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). The ultimate inquiry, it asserted, is centered upon congressional intent. *Id.* at 399, 107 S.Ct. at 757. In view of Congress's evident intent to make agency action presumptively reviewable, a plaintiff has standing only if Congress intended for that particular class of plaintiffs to be relied upon to challenge agency action allegedly in disregard of the law. *Id.* The goal of the test is to exclude those plaintiffs who are more likely to frustrate than to further statutory objectives. *Id.* at 397, n. 12, 107 S.Ct. at 756, n. 12. In cases where a party is the subject of the contested regulation, it is clear that Congress intends for that party to be able to act as a "private attorney general" through bringing a suit to enforce the statute. *Id.* at 399, 107 S.Ct. at 757. But when not the subject of the statute, a party will be denied review if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit the suit." *Id.* at 399-400, 107 S.Ct. at 757.

Though the test is not meant to be especially demanding and there need be no explicit indication of congressional purpose to permit the suit, there are occasions where the requisite congressional intent is not present. *Id.* The Curt provided a hypothetical example of such a case in *Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company

> that has the contract to record and transcribe the agency's proceedings' but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Such a company certainly would have Article III standing because it would have suffered an injury-in-fact which is fairly traceable to the agency action, but it would not meet the heightened requirement of prudential standing as defined by the APA. It simply is not the type of challenge which Congress would have imagined when it passed the statute. *See also Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, ___ U.S. ___, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (union representing Postal employees does not have standing to challenge the Postal Service's suspension of a statute designed to preserve adequate revenues for the Service.).

The D.C. Circuit has had occasion to clarify this standard further. Those not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless "suitable challengers" to the statute because their interests coincide with the interests which Congress did intend to protect. *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924 (D.C.Cir. 1989) (*HWTC IV*). A party is a suitable challenger if its interests coincide systematically, and not simply fortuitously, with the interests of those whom Congress intended to protect. *Id.; Hazardous Waste Treatment Council v. United States Environmental Protection Agency*, 861 F.2d 277, 283 (D.C.Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*).

The legislative history of the FCUA makes it clear that the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks. As noted,

credit unions were seen as a "happy medium" between the loan shark and the bank at a time when neither could satisfy the normal credit needs of the working class. 78 Cong.Rec. 7259 (1934). Further, Congress concluded that commercial banks were not in a position to make funds available to those of small means who generally had no security for loans. *Id.* Against this backdrop, it would defy logic to assume that Congress, in passing the FCUA, wanted to protect the interest of banks.

Nor was the common bond requirement included in the Act to protect banks. Instead, it was designed to ensure that credit unions remain responsive to those they were designed to serve. A major selling point for the FCUA was the outstanding record of state credit unions through the Depression, a record which was attributed to their democratic control, honest management, and faithful service to members. Sen.Rep. No. 555 at 2. It was largely through its limitation of membership to those with a common bond that credit unions were thought to fulfill this democratic ideal. *Barany v. Butler,* 670 F.2d 726, 734 (7th Cir. 1982); *La Caisse Populaire Ste. Marie v. United States,* 563 F.2d 505, 509 (1st Cir. 1977). Such an arrangement was supposed to make credit unions "incapable of exploitation." Sen.Rep. No. 555 at 3. For their part, plaintiffs can cite nothing in the legislative history of the FCUA to buttress their assertion that the common bond requirement was designed to protect banks.[2]

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[2] Plaintiffs point only to a statement made during a hearing regarding a credit union authorization for the District of Columbia two years before the FCUA to support their argument. *See* Plaintiff's Motion of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 12. The speaker mentioned in passing that amendments to the D.C. bill had been proposed after considering the suggestions of the Bankers' Association of the District of Columbia. Even if this court were to accept the legislative history of the D.C. statute as evidence of congressional intent with regard to the federal statute, it is hardly convincing evidence that Congress was trying to protect the interests of commercial banks when it enacted the common bond requirement. In fact, the passage cited emphasizes that the primary concern in authorizing credit unions was that they be successful.

Having shown that Congress did not have in mind the competitive interests of banks when it enacted the common bond requirement, it is a short step to conclude that neither are banks suitable challengers to actions taken under the authority of the FCUA. As this case shows, the interests of banks will rarely if ever coincide with those of credit unions, the interest which Congress did intend to protect, because both compete for the same business. Any coincidence of interest would be at least fortuitous. Thus, because they are neither intended beneficiaries nor suitable challengers, commercial banks are not within the zone of interests which Congress intended to protect when it passed the FCUA.

This position is in keeping the D.C. Circuit decisions on the subject of prudential standing In *HWTC IV* and *HWTC II,* the court found no standing for waste treatment companies which suffered competitive injury and challenged the regulatory structure for the safe treatment, storage, and disposal of hazardous wastes. Because those regulations were designed to protect human health and the environment and not to improve the business opportunities of waste treatment companies, the court was unwilling to infer that Congress intended for such companies to be able to challenge the regulations. *HWTC IV,* 885 F.2d at 924; *HWTC II,* 861 F.2d at 283. Nor did their interests coincide with the interests Congress intended to protect to the point at which they could nonetheless be seen as "suitable challengers" to the regulations. *HWTC IV,* 885 F.2d at 924; *HWTC II,* 861 F.2d at 283. In either case, the fact that firms are benefitted by congressional action, like the court reporters in *Lujan v. National Wildlife Federation* and like the commercial banks in this case, does not mean that an agency decision with regard to that decision con-

fers standing. *Id.; see also National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C.Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990) (organization of federal employees lacks standing to contest the Army's decision to contract out certain services as violative of statutes designed to coordinate budgeting procedures and increase efficiency in government operations.).

The Fourth Circuit reached the same conclusion when presented with facts virtually identical to these. In *Branch Bank & Trust C. v. National Credit Union Administration*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987), the court found no standing for banks to challenge application of the common bond requirement:

> [T]he general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposely sacrificed by Congress to the interests of facilitating credit for people of limited personal means. . . . [T]he common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.

Id. at 626.

Given this specific rationale for the common bond requirement, the court was unwilling to attribute to it a meaning at odds with the general goals of the statute. *Id.* This court shares the Fourth Circuit's basic conclusion.

Plaintiffs erroneously rely on a string of cases in which the Supreme Court has found standing where a group or business has suffered a competitive injury due to agency action. *See Clarke*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Data Processing*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970); *Investment*

Co. Institute v. Camp, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Contrary to plaintiffs' assertion, all of these cases involve statutes directed at restricting entry into a given field or business. Even in *Clarke*, where a trade association representing securities brokers asserted that a decision to allow two national banks to open a discount brokerage operation violated anti-branching laws, the Court found standing because the statute was passed in part due to congressional fear that national banks might obtain monopoly control of credit and money if permitted to branch unrestricted. 479 U.S. at 402, 107 S.Ct. at 758. Because those plaintiffs' members competed with banks in providing discount brokerage services, the Court found that Congress arguably had legislated against the competition that plaintiffs sought to challenge. *Id.* at 403, 107 S.Ct. at 759. This intent to restrict entry was what made plaintiffs "very reasonable candidates to seek review." *Id.* As noted, Congress had no such intent when it passed the FCUA.

CONCLUSION

For these reasons, the court finds that plaintiffs lack prudential standing to challenge the action of the NCUA. Accordingly, defendant's motion to dismiss is granted and the case is dismissed.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, et al.
Appellants,
v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.
Appellees.

BEFORE:Ginsburg and Tatel, Circuit Judges,
and Buckley, Senior Circuit Judge

[Filed October 23, 1996]

ORDER

Upon consideration of appellees' petitions for rehearing filed on September 13 and September 16, 1996, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, et al.
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.
Defendants.

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson Randolph, Rogers and Tatel, Circuit Judges

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[Filed on October 23, 1996]

ORDER

Appellees' Suggestions For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of either suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestions are denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX G

5 USC § 702

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

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Current through P.L. 104-207, approved 9-30-96

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2)

confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX H

12 USC § 1759 (Section 109 of the FCUA)

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 14--FEDERAL CREDIT UNIONS
SUBCHAPTER I--GENERAL PROVISIONS

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Current through P.L. 104-207, approved 9-30-96

§ 1759. Membership

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

APPENDIX I

RULES and REGULATIONS

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 707, 708, and 745

[NCUA IRPS 82-1]

Membership in Federal Credit Unions; Interpretative Ruling and Policy
Statement

Tuesday, April 20, 1982

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interpretative ruling and policy statement.

SUMMARY: The NCUA Board has adopted a policy statement clarifying its interpretation of Sections 107(14) and 109 of the Federal Credit Union Act (12 U.S.C. 1757(14) and 1759) to (1) permit a Federal credit union, which purchases the loans of a liquidating credit union, to offer membership to the borrowers whose loans have been purchased, and (2) authorized the granting of charters, charter amendments, conversions to Federal charters, and mergers to credit unions which desire to serve multiple occupational groups. This action was taken in response to interest expressed by credit unions. It is intended to clarify NCUA's policy on membership in Federal credit unions, to make portfolios of loans sold by the National Credit Union Share Insurance Fund more attractive to potential Federal credit union purchasers,

and to ensure the continued availability of credit union service.

EFFECTIVE DATE: April 1, 1982.

ADDRESS: National Credit Union Administration, 1776 G Street, NW., Washington, D.C. 20456.

FOR FURTHER INFORMATION CONTACT:

Charles Filson, Director, Office of Programs, at the above address or telephone (202) 357-1130.

Interpretative Ruling and Policy Statement (IRPS) 82-1

a. A Federal credit union which purchases the loans of a liquidating credit union may offer full membership rights and services to the borrowers whose loans it has purchased. Accordingly, the purchasing Federal credit union must apply for and obtain an appropriate amendment to section five of its charter.

b. With respect to applications or requests for multiple occupational type Federal credit union charters, charter amendments, conversions to Federal charters, and mergers, the NCUA Board hereby authorizes the NCUA Regional Directors to approve or disapprove these applications/requests in accordance with the following guidelines.

1. The occupational groups to be included (new charter) or added (amendment, merger, conversion) have specifically requested credit union service.

2. The applicant demonstrates that credit union service can be provided and that each group wishes to be served by the applicant.

3. All the occupational groups to be included (new charter) or added (amendment, merger, conversion) are located within a well defined area.

4. The applicant has adequately supported the proposal as economically feasible and advisable.

In all cases of disapproval of a select employee group application, the Regional Director will advise the applicant of the reason(s) for disapproval and of the right to appeal the decision to the NCUA Board.

By the National Credit Union Administration Board, April 1, 1982.

Dated: April 12, 1982.